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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AMANDA GONZALEZ and
AUDRIANA GONZALEZ on behalf
of themselves, all others similarly
situated and on behalf of the general
public,

Plaintiffs,

v.

BURLINGTON COAT FACTORY
WAREHOUSE CORPORATION
and DOES 1-10,

Defendants.

CASE NO. 5:18-cv-00666-JGB-SP

Honorable Jesus G. Bernal

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR ATTORNEYS'
FEES, COSTS, AND CLASS
REPRESENTATIVE ENHANCEMENT
PAYMENTS**

Date: March 1, 2021
Time: 9:00 a.m.
Courtroom: 1

Filed: February 27, 2018
FAC Filed: October 31, 2018
Trial Date: None

1 **TO THE HONORABLE JESUS G. BERNAL, ALL PARTIES, AND THEIR**
2 **COUNSEL OF RECORD:**

3 PLEASE TAKE NOTICE that on March 1, 2021, at 9:00 a.m. in Courtroom No.
4 1 in the above entitled courthouse located at 3470 Twelfth Street, Riverside, CA 92501,
5 Plaintiffs Amanda Gonzalez and Audriana Gonzalez will move this Court for an order
6 granting Plaintiffs' Motion for Attorneys' Fees, Costs, and Class Representative
7 Enhancement Payments: (1) Approval of an award of attorneys' fees to Class Counsel
8 in the amount of \$750,000, which is 25% of the Maximum Settlement Amount; (2)
9 Approval of an award of costs to Class Counsel in the amount of \$25,826.97 (originally
10 estimated not to exceed \$50,000); and (3) Approval of Plaintiffs' Enhancement
11 Payments not to exceed \$7,500 each.

12 This Motion is made pursuant to Federal Rule of Civil Procedure 23(h) and the
13 Court's Order granting Plaintiffs' Motion for Preliminary Approval of Class Action
14 Settlement. The basis of Plaintiffs' Motion is that Class Counsel's request for attorneys'
15 fees and costs is fair and reasonable and that Plaintiffs' efforts and assistance in this case
16 justify the requested enhancement award.

17 This Motion is based upon this notice, the accompanying Memorandum of Points
18 & Authorities filed herewith, the accompanying Declaration of David Mara, Esq. filed
19 herewith, the Declaration of Plaintiff Amanda Gonzalez, the Declaration of Plaintiff
20 Audriana Gonzalez, the Joint Stipulation of Class Action and PAGA Representative
21 Action Settlement and Release and all exhibits thereto, the Court's Order Granting
22 Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, the filings on
23 record in this case, and upon such further evidence, both documentary and oral, that may
24 be presented at the hearing of this motion.

25 Dated: February 1, 2021

MARA LAW FIRM, PC

26 By: /s/ David Mara

27 David Mara, Esq.

28 Attorneys for Plaintiffs

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I. INTRODUCTION

Plaintiffs Amanda Gonzalez and Audriana Gonzalez (“Plaintiffs”) respectfully request that this Court enter an Order granting Class Counsel’s Attorneys’ Fee Award and Cost Award, as well as the Class Representative Enhancement Payment in accordance with the Parties’ Joint Stipulation of Class Action and PAGA Representative Action Settlement and Release (“Joint Stipulation”) which this Court preliminarily approved on August 21, 2020.

As set forth in Plaintiffs’ Preliminary Approval Motion and Final Approval Motion, this is a \$3,000,000 Maximum Settlement Amount (“MSA”) achieved on behalf of 5,776 Class Members. This Class consists of all current and/or former non-exempt, non-union, hourly employees provided as temporary workers by Lyneer Staffing Solutions¹ who worked one or more shifts in a workweek at Defendant Burlington Coat Factory Warehouse Corporation’s (“Burlington” or “Defendant”) distribution centers located in California at any time between February 27, 2014 and August 21, 2020 (the date of Preliminary Approval). The Settlement represents a fair, adequate, and reasonable resolution to this litigation as it provides definite and significant recovery in light of the risks of further litigation.

In addition, the proposed Settlement is reasonable in light of the strengths of Plaintiffs’ case, risks of further litigation, and the estimated values of Plaintiffs’ claims at trial. The Settlement’s value is further increased because no funds will revert to Burlington.

The settlement represents a substantial recovery for the Class and a well-crafted compromise of the Parties’ divergent positions. Further, the settlement has been reached after considerable negotiation and was guided by the efforts of a highly experienced

¹ “Lyneer Staffing Solutions” means Lyneer Staffing Solutions, Infinity Staffing Solutions, LLC dba Lyneer Staffing Solutions, Staff4Jobs, LLC dba Lyneer Staffing Solutions, Employers HR LLC, Ciera Staffing, LLC, Lyneer Staffing Solutions, LLC, and all of their members, predecessors, successors, affiliates, and related companies, including but not limited to, Gary Spinner, Todd McNulty, James Radvany, Bryan Smith, Brian Henderson, Marti White and Greg Lomonaco.

1 mediator. Each side evaluated the strengths and weaknesses of their case and
2 independently concluded that this settlement represents a responsible means of
3 addressing Plaintiffs' claims and Burlington's defenses.

4 This recovery represents a positive outcome for the Class Members, all of whom
5 may normally not possess the means to individually pursue his or her own claims. The
6 Class Members in this case have received the benefit of working with experienced and
7 knowledgeable wage and hour attorneys who vigorously pursued, litigated, negotiated,
8 and eventually settled this highly contested matter and reached a successful resolution.
9 Therefore, for all of the foregoing reasons, Class Counsel respectfully requests the Court
10 approve the requested attorneys' fees in the amount of \$750,000 (representing 25% of
11 the Maximum Settlement Amount, which is the benchmark in common fund cases in the
12 Ninth Circuit), litigation costs in the amount of \$25,826.97 (originally estimated not to
13 exceed \$50,000), and Plaintiffs' enhancement awards in the amount of \$7,500 each.

14 **II. THE REQUESTED ATTORNEYS' FEES AND COSTS ARE**
15 **REASONABLE**

16 **A. Class Counsel Have Extensive Experience Acting as Class Counsel**

17 Class Counsel's experience in complex class action matters is extensive. Class
18 Counsel have prosecuted numerous cases on behalf of employees for California Labor
19 Code violations and thus are experienced and qualified to evaluate the class claims and
20 to evaluate settlement versus trial on a fully informed basis, and to evaluate the viability
21 of the defenses. *See* Declaration of David Mara, Esq. in Support of Final Approval of
22 Class Action Settlement ("Mara Decl.") ¶¶ 2-20. Indeed, Mr. Mara was class counsel in
23 *Hohnbaum et al. v. Brinker Restaurant Corp et al.*, which is the subject case in the
24 landmark decision of *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004
25 (2012). *See* Mara Decl. ¶ 14. This experience instructed Class Counsel on the risks and
26 uncertainties of further litigation and guided their determination to endorse the proposed
27 settlement.

B. The Court Should Approve of the Requested Attorneys' Fees

Both California and federal courts have recognized that an appropriate method for awarding attorney's fees in class actions is to award a percentage of the "common fund" created as a result of the settlement. *Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 726, 765 (2004).

1. The Common Fund Doctrine

California state and federal courts have recognized that an appropriate method for determining an award of attorneys' fees is based on a percentage of the total value of benefits to class members by a settlement, also known as the "common fund" method. *Serrano v. Priest*, 20 Cal.3d 25, 34 (1977) (*Serrano III*); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). "Despite its primacy, the lodestar method is not necessarily utilized in common fund cases." *Lealao v. Beneficial California, Inc.*, 82 Cal.App.4th 19, 27 (2000). The purpose of the common fund/percentage approach is to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." *Vincent*, 557 F.2d at 769. In *Quinn v. State of California*, 15 Cal.3d 162, 167 (1995), the Court stated: "[O]ne who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits may require those passive beneficiaries to bear a fair share of the litigation costs."

Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal.4th 105, 110 (1995), the California Supreme Court recognized that the common fund doctrine has been applied "consistently in California when an action brought by one party creates a fund in which other persons are entitled to share." The reasons for applying the common fund doctrine include: "...fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by the expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; encouragement of the attorney for the successful litigant, who will be more willing to undertake and diligently

1 prosecute proper litigation for the protection or recovery of the fund if he is assured that
2 he will be properly and directly compensated should his efforts be successful.” *Id.*

3 Class Counsel have undertaken representation at their own expense, with
4 compensation contingent on providing a benefit to the Class. Participating Class
5 Members will benefit by the terms of the settlement. Given the defined and clearly
6 traceable monetary benefit to the class, the Court can base an award of attorneys’ fees
7 on the Class Members’ benefit using a common fund approach. Class Counsel’s request
8 for 25% of the common fund is fair compensation for obtaining a positive result for the
9 Participating Class Members and, in doing so, undertaking complex, risky, expensive,
10 and time-consuming litigation purely on a contingent basis.

11 **a. The Percentage Requested is Reasonable**

12 The fees, here, were wholly contingent and the case presented more risk than the
13 usual contingent fee case. There was the prospect of the enormous cost inherent in class
14 action litigation, as well as a long battle with Burlington, who had retained experienced,
15 reputable legal counsel. That prospect has previously become reality, in both trial courts
16 and appellate courts, and in other wage and hour class litigation. Class Counsel risked
17 not only a great deal of time, but also a great deal of expense to ensure the successful
18 litigation of this action on behalf of all Participating Class Members.

19 There is no general rule on what a reasonable percentage of a common fund is:

20 No general rule can be articulated on what is a reasonable percentage of a common
21 fund. Usually 50% of the fund is the upper limit on a reasonable fee award from
22 a common fund in order to assure that the fees do not consume a disproportionate
23 part of the recovery obtained for the Class, although somewhat larger percentages
24 are not unprecedented.

25 Newberg on Class Actions, 3rd Ed., 1992, §14.03. Regarding percentage fee
26 awards, Newberg states: “[A]chievement of a substantial recovery with modest hours
27 expended should not be penalized but should be rewarded for considerations of time
28 saved by superior services performed.” *Id.* at § 14.01. Courts in the Ninth Circuit
generally find that a benchmark of 25% of the common fund is a reasonable fee award.

1 *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1019 (“This circuit has
2 established 25% of the common fund as a benchmark award for attorney fees.”)

3 Here, awarding a fee constituting 25% of the common fund is appropriate. Class
4 Counsel underwent considerable expense of \$25,826.97 in litigation costs and bore the
5 burden and risk of not prevailing and thus losing that cost. In addition, and most
6 importantly, Class Counsel’s industries and efforts resulted in obtaining a settlement of
7 \$3,000,000 for the Class. As such, based on the work performed and the achievement of
8 a \$3,000,000 settlement for the Class Members, awarding Class Counsel the federal
9 benchmark of 25% of the common settlement fund is appropriate.

10 **b. The Fee Requested is Within the Range of Fees Approved in**
11 **Comparable Cases**

12 The requested fee of \$750,000 is 25% of the Maximum Settlement Amount and is
13 in line with the federal “benchmark,” which California has endorsed. *In Re Consumer*
14 *Privacy Cases*, 175 Cal. App. 4th 545, 556 (2009). A review of class action settlements
15 over the past several years shows that courts have awarded fees in the range of 25% to
16 40%, depending on the circumstances of the case.² California Superior and District Court

17
18
19 ² For example:

- 20 (1) *Ortiz v. Genco, Inc.*, Case No. 16-cv-04601, 2019 U.S. Dist. LEXIS 70625 (N.D.
21 Cal. April 23, 2019) (Hon. Yvonne Gonzalez Rodgers – Awarding attorneys’ fees
22 25% of \$3,150,000 settlement in a pre-certification wage and hour and Fair Credit
23 Reporting Act class action);
24 (2) *Greer v. Dick’s Sporting Goods, Inc.*, Case No. 15-cv-01063, 2020 U.S. Dist.
25 LEXIS 168923 (E.D. Cal. Sept. 15, 2020) (Hon. Kimberly J. Mueller – Awarding
26 attorneys’ fees of 30% of \$2,900,000 in a certified security check and business
27 reimbursement wage and hour class action);
28 (3) *Birch v. Office Depot*, Case No. 06-cv-1690 (S.D. Cal. Sept. 28, 2007) (Hon. Dana
M. Sabraw – Awarding attorneys’ fees of 40% of \$16,000,000 settlement in pre-
certification meal/rest period class action);
(4) *Dirienzo v. Dunbar Armored, Inc.*, Case No. 09-cv-02745, (S.D. Cal. Aug. 5,
2011) (Hon. Dana M. Sabraw – awarding attorneys’ fees of \$500,000, 33.33% of
\$1,500,000 settlement in a pre-certification expense reimbursement, rest and meal
period class action);
(5) *Mayville, et al. v. Kor Hotel Group, L.L.C., et al.*, Case No. 04-cv-08461 (C.D.
Cal. Oct. 3, 2005) (Hon. Audrey B. Collins – awarding attorneys’ fees of \$480,000,
30% of \$1,600,000 settlement in pre-certification meal and rest period class
action);

1 judges have adopted the percentage method for determining fee awards in the range that
2 is requested by Class Counsel herein or even larger. As the fee requested here is in line
3 with the fees customarily awarded in in the Ninth Circuit under the common fund
4 doctrine, it is respectfully requested that the Court grant this request at final approval.
5 The reasonableness of the fee is further evidenced when cross-checked against the
6 lodestar method.

7 **2. A Lodestar Cross-Check Confirms the Reasonableness of the** 8 **Requested Fee**

9 Class Counsel’s fee request is also reasonable when calculated using the lodestar
10 method. Under the lodestar method, a base fee amount is calculated from a compilation
11 of time reasonably spent on the case and the reasonable hourly compensation of the
12 attorney. *Serrano v. Priest*, 20 Cal. 3d 25, 48 (1977). The court then enhances this
13 lodestar figure by a “multiplier” to account for a range of factors, such as the novelty
14 and difficulty of the case, its contingent nature, and the degree of success achieved. *Id.*
15 at 49; *see also Ketchum v. Moses*, Cal.4th 1122, 1132-36 (2001); *PLCM Group, Inc. v.*
16 *Drexler*, 22 Cal.4th 1084, 1096 (2000); *Thayer v. Wells Fargo Bank*, 92 Cal.App.4th
17 819, 834 (2001) (“[t]here is no ... rule limiting the factors that may justify an exercise
18 of judicial discretion to [adjust the] lodestar”).

19 Class Counsel have worked 811 hours to date on this case and have calculated
20 the lodestar fee on those hours at \$542,600 at rates reflecting those currently earned in
21 the market place. Mara Decl. ¶ 25-32, 35; **Exhibit 1**, Summary of Time and Costs. All
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23

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- 24 (6) *Covillo v. Specialty’s Café*, Case No. 11-cv-00594, 2014 U.S. Dist. LEXIS (N.D.
25 Cal. March 6, 2014) (Hon. Donna M. Ryu – Awarding attorneys’ fees of 30% of
\$2,000,000 settlement in pre-certification wage and hour class action);
26 (7) *Alvarado v. Nederend*, Case No. 08-cv-01099, 2011 U.S. Dist. LEXIS 52793 (E.D.
27 Cal. May 17, 2011) (Hon. Oliver W. Wanger – Awarding attorneys’ fees of
33.33% in precertification wage and hour class action);
28 (8) *Espinosa v. Cal. Coll. Of San Diego*, Case No. 17-cv-744, 2018 U.S. Dist. LEXIS
60106 (S.D. Cal. April 8, 2018) (Hon. Michael M. Anello – Awarding attorneys’
fees of 30% of \$300,000 in pre-certification wage and hour class action).

1 of the work and tasks performed by Class Counsel were reasonable and necessary to the
2 prosecution of this case and are reflected in the result achieved.

3 Courts “routinely enhance[] the lodestar to reflect the risk of non-payment in
4 common fund cases.” *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002);
5 *Graham v. DaimlerChrysler Corp.*, 34 Cal.4th 553, 579 (2004) (“One of the most
6 common fee enhancers [...] is for contingency risk.”). Such an enhancement “mirrors
7 the established practice in the private legal market of rewarding attorneys’ fees for taking
8 the risk of nonpayment by paying them a premium over their normal hourly rates for
9 winning contingency cases.” *Vizcaino*, 220 F.3d at 1051. A risk multiplier also serves to
10 bring the financial incentives for enforcing important rights “into line with incentives
11 [attorneys] have to undertake claims for which they are paid on a fee-for-service basis.”
12 *Ketchum*, 24 Cal.4th at 1132. In determining whether or not to enhance or reduce the
13 lodestar, California courts take into account multiple factors, including: the time and
14 labor required; the skill requisite to perform the legal services properly; the preclusion
15 of other employment by the attorney due to the acceptance of the case; the contingent
16 nature of the fee; the amount involved and results obtained; the experience, reputation,
17 and ability of the attorney; and awards in similar cases. *Cates v. Chiang*, 213 Cal. App.
18 4th 791, 822 (2013).

19 This was a highly contested matter which required a significant amount of time
20 and labor. The settlement was only possible after considerable investigation. Throughout
21 the course of litigation, the Parties engaged in concentrated informal discovery.
22 Although informal in the sense that documents, data, and information were produced
23 pursuant to informal requests instead of formal discovery inquiries, the gathering of
24 information was no less robust than Plaintiffs would obtain through formal means. The
25 discovery conducted and the resultant meet and confer efforts led to exchanging
26 hundreds of pages of documents and hundreds of thousands of lines of data. The
27 information and data included, for example, policies and best practices, meal period and
28 rest break policies, contracts between Burlington and Lyneer Staffing Solutions, Lyneer

1 Staffing Solutions’ time records, attendance records, and pay records, as well as
2 personnel files. Plaintiffs hired an expert, Mr. Jarrett Gorlick, who analyzed and worked
3 with counsel to analyze the timekeeping and payroll data. Mara Decl. ¶ 21.

4 The litigation required considerable analysis and time interviewing class members
5 about their experiences. This was a critical component to the case and the liability points.
6 These interviews provided support for Plaintiffs contention that Burlington substantially
7 controls the Class Members and would meet the factors delineated in the *Borello* test in
8 *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341.
9 Burlington disputes that it is the employer under *Borello*. Burlington maintains that, on
10 balance, the staffing company – Lyneer Staffing Solutions – is the employer. Burlington
11 relies on the facts that Lyneer recruits and hires Class Members, pays Class Member
12 wages, maintains time, attendance, and wage records of Class Members, provides meal,
13 rest period and other applicable employment policies, sets Class Member wages,
14 discharges Class Members with or without cause, and even provides on-site supervision.
15 Because Burlington concludes that all control under *Borello* has been exerted through
16 Lyneer, whom Burlington claims is the appropriate employer, class member interviews
17 provided valuable support to refute Burlington’s position. Mara Decl. ¶ 22.

18 Class Counsel investigated and analyzed documents and data relating to
19 Plaintiffs’ classwide claims. In addition, Class Counsel had to marshal the evidence in a
20 manner in which it could be adjudicated on a classwide basis, an endeavor that cannot
21 be underscored. So often, lawyers unskilled in the class action aspect of wage and hour
22 cases do not pay attention to or put the work into how the evidence must be presented
23 for classwide adjudication. Strong classwide cases perish in the hands of inexperienced
24 counsel because the case has not been worked up to succeed at certification. Class
25 Counsel here has considerable experience in class litigation and, from the beginning of
26 the case, marshalled the evidence with a sharp focus on classwide proof needed for the
27 matter to get certified as well as to prevail at summary judgment. Throughout the matter,
28 as evidence was being gathered through documents and witness interviews, Class

1 Counsel were reducing the data to a “living class certification motion” and “living
2 summary judgment motion.” This filtering of voluminous evidence into classwide proof
3 while keeping an eye on the merits of the litigation resulted in a considerable amount of
4 attorney time and skill. Mara Decl. ¶ 23.

5 Most importantly, all services were performed by Class Counsel on a contingent
6 basis. Both California and federal courts recognize that attorneys should be compensated
7 for taking on such contingent risks and provided with financial incentives to enforce
8 important rights and protections like those at issue in this case. *See, e.g., Vizcaino*, 290
9 F.3d at 1051; *Ketchum*, 24 Cal.4th at 1132-33. Here, Class Counsel bore the risk that, in
10 spite of all of their efforts and skill employed, there may be no recovery. Thus, a risk
11 multiplier is appropriate. Mara Decl. ¶ 24.

12 Class Counsel respectfully request a fee of \$750,000. Based on the total attorney
13 hours expended and rates, Class Counsel’s lodestar would require a modest 1.38
14 multiplier to raise the generated fees to the requested amount. Far greater multipliers
15 have been awarded in similar cases, and the total amount of fees sought by Class Counsel
16 is also reasonable compared to fees awarded in like cases. Courts routinely enhance
17 lodestar amounts based on multipliers that “range from 2 to 4 or even higher.”³ Thus,
18 consideration of the lodestar method as a cross-check to the percentage figure sought
19 strongly supports the reasonableness of the requested fee award. Class Counsel move
20 for and respectfully request that the Court grant attorneys’ fees in the amount of
21 \$750,000. Mara Decl. ¶ 32.

22 3. Class Counsel’s Hourly Rates are Reasonable

23 Class Counsel’s hourly rates are between \$500 and \$800 and are in line with
24

25 ³ *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255; *see, e.g., Vizcaino*,
26 290 F.3d at 1051 (approving multiplier of 3.65); *Wal-Mart Stores, Inc. v. Visa U.S.A.,*
27 *Inc.* (2d Cir. 2005) 396 F.3d 96, 123 (approving multiplier of 3.5); *Craft v. County of*
28 *San Bernardino* (C.D. Cal. 2008) 624 F. Supp. 2d 1113, 1125 (awarding multiplier of
5.2 and collecting cases with cross-check multipliers ranging from 4.5 to 19.6);
Glendora Community Redevelopment Agency v. Demeter (1984) 155 Cal.App.3d 465,
479-80 (approving fee award with multiplier of 12).

1 rates typically approved in wage and hour class action and PAGA litigation and which
2 rates have been approved by Courts in California in the Los Angeles, Sacramento, San
3 Francisco, Alameda, Orange and San Diego County Superior Courts. Mara Dec. ¶¶ 36-
4 38; **Exhibit 2**, Westlaw Court Express's Legal Billing Report, Volume 14, Number 3,
5 California Region for December 2012; **Exhibit 3**. 2014 Declaration of Richard M. Pearl
6 in *Hohnbaum v. Brinker Restaurant Corp.* SDSC GIC834348; **Exhibit 4**, 2012 National
7 Law Journal Survey of Hourly Billing Rates for Partners and Associates).

8 A reasonable hourly rate is the prevailing rate charged by attorneys of similar
9 skill and experience in the relevant community. *PLCM Group, Inc.*, 22 Cal. 4th 1084,
10 1095 (2000); *Hopson v. Hanesbrands Inc.*, 2009 U.S. Dist. LEXIS 33900 (N.D. Cal.
11 Apr. 3, 2009). When determining a reasonable hourly rate, courts may consider factors
12 such as the attorney's skill and experience, the nature of the work performed, the
13 relevant area of expertise and the attorney's customary billing rates. *Flannery v.*
14 *California Highway Patrol*, 61 Cal. App. 4th 629, 632 (1998).

15 Class Counsel's skill and experience support their hourly rates. Their practice is
16 limited exclusively to litigation, focusing on the representation of employees in wage
17 and hour class action and PAGA matters. As prominent attorneys in the field of wage
18 and hour employment litigation, Plaintiffs' counsel continually monitors the prevailing
19 market rates charged by both defense and plaintiff law firms and set the billing rates of
20 their attorneys and paralegals/law clerks to be consistent with the prevailing market rates
21 in the private sector for attorneys and staff of comparable skill, qualifications and
22 experience. Other wage and hour attorneys working as class counsel before California
23 courts charge comparable if not higher rates. Mara Dec. ¶¶ 36-38; **Exhibits 2-4**.

24 **4. Class Counsel's Total Hours are Reasonable**

25 In determining a lodestar fee, reasonable hours include, in addition to time spent
26 during litigation, the time spent before the action was filed, including time spent
27 interviewing clients, investigating the facts and the law, and preparing the initial
28

1 pleadings.⁴ Further, the fee award should include fees incurred to establish and defend
2 the attorneys' fee claim. *Serrano v. Priest*, 32 Cal.3d 621, 639 (1982) ("*Serrano IV*").
3 Class Counsel has expended a total of 811 hours on this case. The work performed by
4 Class Counsel in order to achieve a settlement that will provide valuable consideration
5 to the class members is summarized by Class Counsel in the Mara Declaration submitted
6 herewith. Mara Dec. ¶¶ 25-30.

7 Counsel's many tasks, in summary form, included the following: pre-filing
8 investigation and legal research; communicating with Plaintiffs; interviewing class
9 members; conducting personnel file reviews as well as wage and time record
10 consultations and audits for class members; investigation into Burlington's assets and
11 revenue; drafting a PAGA letter and notifying the LWDA of Plaintiffs' claims,
12 settlement, and motions; investigation into Burlington's pay-structures and policies;
13 draft and file pleading; respond to class member inquiries regarding case progression;
14 analyze and respond to Burlington's numerous defenses as well as research and
15 investigate Burlington's position on misclassification, third-party complaints, and
16 impleader; numerous conferences with Burlington's Counsel regarding a variety of
17 issues throughout the litigation, mediation, and settlement; draft discovery and meet and
18 confer with Burlington; analyze records produced by Burlington relating to its policies,
19 pay-structures, and time keeping; provide data to expert and consult with expert
20 regarding pay data and time data; filter evidence into classwide proof; draft and reduce
21 data to a "living class certification motion" and "living summary judgment motion";
22 prepare for and attend two mediations; draft mediation brief and mediation damage and
23 exposure models; draft and file stipulation and amended complaint; draft, review,
24 negotiate, and revise the settlement agreement; discussions with settlement
25 administrator regarding administration duties; respond to class member inquiries
26 regarding the Class Notice and the Settlement; draft settlement approval motion and

28 ⁴ See *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 62 (1980).

1 supporting papers; review settlement administrator's declaration; and appearing at the
2 final approval hearing. Mara Decl. ¶¶ 25-30. All of the tasks and work performed were
3 reasonable and necessary to the prosecution of this case. The work performed was
4 particularly justified, in light of the result achieved.

5 **5. Costs of Litigation**

6 Class Counsel seeks reimbursement of \$25,826.97 in litigation costs and expenses
7 (originally estimated not to exceed \$50,000). All costs were reasonable and necessary
8 to prosecuting this case and the results achieved and are fair, reasonable, and unopposed
9 by Burlington. Mara Decl. ¶ 33; **Exhibit 1**.

10 **6. Class Representative Enhancement Payments**

11 Subject to the Court's approval, Plaintiffs shall receive a payment not to exceed
12 \$7,500 each. The payment shall be made from the MSA. If the amount awarded is less
13 than the amount requested, the difference shall become part of the Net Settlement
14 Amount ("NSA"). Mara Decl. ¶ 34.

15 Courts routinely approve service payments, or incentive awards, to compensate
16 a named plaintiff for the services he or she provides and the risks he or she incurs during
17 class litigation. *See In re Cellphone Fee Termination Cases*, 186 Cal.App.4th 1380,
18 1393 (2010); *see also Bell v. Farmers Ins. Exch.*, 11 Cal.App.4th 715, 725-26 (2004)
19 (upholding services payments to class representatives). Courts have regularly and
20 routinely granted approval of settlements containing such enhancements.⁵ In Class
21 Counsel's experience, the typical enhancement award in wage and hour class action
22
23

24 ⁵ *See, e.g., Staton v. Boeing*, 327 F.3d 938, 977 (9th Cir. 2003); *accord Cook v. Niedert*,
25 142 F.3d 1004, 1015 (7th Cir. 1998); *Roberts v. Texaco*, 979 F. Supp. 185 (S.D.N.Y.
26 1997) ("present or past employee whose present position or employment credentials or
27 recommendation may be at risk by reason of having prosecuted the suit, who therefore
28 lends his or her name and efforts to the prosecution of litigation at some personal peril, a
substantial enhancement award is justified"); *Thornton v. East Texas Motor Freight*, 497
F.2d 416, 420 (6th Cir. 1974) ("We also think there is something to be said for rewarding
those drivers who protect and help to bring rights to a group of employees who have been
the victims of discrimination.").

1 settlements ranges from \$5,000 to \$75,000. Very commonly there is more than one class
2 representative who receives an award in the above range.

3 The requested enhancements of \$7,500 are appropriate and reasonable and
4 unopposed by Burlington. These payments are made, in part, to compensate Plaintiffs
5 for the work they performed on this case. There is no question that this case would not
6 have reached the same result but for Plaintiffs' involvement and input at all stages of the
7 litigation. *See* Declaration of Plaintiff Amanda Gonzalez; *see also* Declaration of
8 Plaintiff Audriana Gonzalez.

9 The requested service awards are also reasonable considering the reputational
10 risks that Plaintiffs assumed in bringing this action against Burlington. Plaintiffs put
11 their future employment prospects at risk by becoming class representatives, as the fact
12 that they filed a lawsuit "is searchable on the internet and may become known to
13 prospective employers when evaluating" their future employment. *Guippone v. BH S&B*
14 *Holdings, LLC*, 2011 U.S., Dist. LEXIS 126026, *20 (S.D.N.Y. Oct. 28, 2011).
15 Employers routinely screen employee candidates to determine whether they have ever
16 filed a suit against other employers, allowing them to screen out the litigious candidates.
17 An entire industry exists that allows employers to run extensive background searches on
18 potential employees. Companies who provide these services specifically highlight the
19 fact that their services allow employers to weed out litigious employment candidates.
20 Reliable Plant outlines ways that employers can "get a sense of whether a prospective
21 employee is likely to sue" the employer, through background checks and other means,
22 to screen out these employees.⁶ Onicra Credit Rating Agency of India states:
23 "Background screening has become a necessity in today's litigious society." Back Track
24 Screening also represents: "In today's litigious culture, employers simply cannot afford
25 to hire employees who will put their company at risk."⁷ PreciseHire also offers

26 _____
27 ⁶ See Reliable Plant, www.reliableplant.com/Read/6959/a-solution-to-fear-of-hiring-litigious-employees.

28 ⁷ See Back Track Screening, <http://www.btscreening.com/wp-content/uploads/2012/09/Screening-101.pdf>.

1 employment screening and similarly warns: “with today’s business climate being
2 extremely competitive and highly litigious, conducting pre-employment background
3 checks has become a necessity.”⁸

4 As representatives for the absent class members, Plaintiffs also risked a potential
5 judgment taken against them for attorneys’ fees and costs if this matter had not been
6 successfully concluded. Courts affirm that a losing party is liable for the prevailing
7 party’s costs, *Early v. Superior Court*, 79 Cal.App.4th 1420, 1433 (2000), and in some
8 wage and hour actions, such as this case, pursuant to California Labor Code § 218.5, for
9 attorneys’ fees as well. Unfortunately, courts have entered several judgments against
10 class representatives. *See e.g. Koehl v. Verio, Inc.* 142 Cal.App.4th 1313, 1328 (2006)
11 (a wage and hour class action where Defendant prevailed at trial, the named Plaintiffs
12 were held liable, jointly and severally for the Defendant’s attorneys’ fees, in an amount
13 exceeding \$500,000); *Whiteway v. Fedex Kinkos Office & Print Services, Inc.*, 2007
14 U.S. Dist. LEXIS 95398 (N.D. Cal. 2007) (a wage and hour misclassification case lost
15 on summary judgment, after the case was certified, the court assessed costs against the
16 named Plaintiff in the sum of \$56,788). The risk of payment of Burlington’s costs, alone,
17 is a sufficient basis for an award of the requested enhancement sum. Few individuals are
18 willing to take this risk, and the appointed Class Representatives here championed a
19 cause on behalf of others with potentially huge monetary risks.

20 The enhancement requests are modest for the work performed, risks undertaken
21 for payment of fees and costs if this case had not been successfully concluded, stigma
22 on future employment opportunities, and the benefits all class members will enjoy as a
23 result of Plaintiffs’ efforts. Thus, the Court is respectfully requested to grant Plaintiffs’
24 request.

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28 ⁸ See PreciseHire, <https://precisehireblog.wordpress.com/2013/11/21/pre-employment-background-checks-have-become-a-busines-necissity/>.

1 **III. CONCLUSION**

2 Based on the foregoing, Plaintiffs respectfully request that the Court find the
3 settlement fair, reasonable, and adequate and grant this motion for Class Counsel's
4 attorneys' fees, reimburse the costs Class Counsel incurred in litigating this matter, and
5 approve Plaintiffs' enhancement requests.

6
7 Dated: February 1, 2021

MARA LAW FIRM, PC

8
9 /s/ David Mara

10 David Mara, Esq.

11 Attorneys for Plaintiffs
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